

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
Structure and Practices of the Video Relay Service ) CG Docket No. 10-51
Program )
Telecommunications Relay Services ) CG Docket No. 03-123
And Speech-to-Speech Services for )
Individuals with Hearing and Speech Disabilities )
Video Relay Service Provider Requests for )
Temporary Waiver of the Speed-of-Answer Rule )

ORDER

Adopted: June 24, 2014

Released: June 24, 2014

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. This Order defers for six months the effective date of the new 30-second standard governing how quickly a video relay service (VRS) provider must respond to a consumer's request to make a VRS call. This new standard, which otherwise takes effect July 1, 2014, requires that providers must answer (i.e., provide the equivalent of a dial tone) 85 percent of consumers' VRS call attempts within 30 seconds, measured daily. Providers and consumer groups, however, have made a persuasive showing that to compel providers to meet a 30-second response time by July 1st, only six months after the current 60-second time standard took effect, could be unnecessarily disruptive to providers' ability to offer high quality service. On balance, we believe this temporary delay in the transition to a faster speed-of-answer standard will benefit consumers and serve the public interest by ensuring that quality of service is maintained, avoiding undue disruption in the supply of interpreters, and allowing providers more predictability and stability in their operations during the transition to faster speed-of-answer requirements.

2. As a result of this temporary waiver, which is granted by the Consumer and Governmental Affairs Bureau (Bureau) of the Federal Communications Commission (FCC or Commission),1 the current speed-of-answer rule, requiring that 85 percent of all VRS call attempts be answered within 60 seconds, measured daily, will remain applicable to all providers through December 31, 2014.2 The other relief requested by various VRS providers has not been shown to serve the public

1 See 47 C.F.R. §§ 0.141, 0.361.

2 As explained in more detail below, in June 2013, the Commission adopted strengthened speed-of-answer standards for VRS, which changed the compliance measurement requirement from monthly to daily, increased the required percentage of compliant calls from 80 percent to 85 percent, and replaced the previous 120-second time interval with shorter time intervals to be phased in over a two-step transition period. The current 60-second criterion became effective January 1, 2014. Structure and Practices of the Video Relay Service Program, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disability, CG Docket Nos. 10-51, 03-123, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 8618, 8671-73, ¶¶ 135-41 (2013) (2013 VRS Reform Order), pet. for review pending sub nom. Sorenson Communications, Inc. v. FCC (D.C. Cir., No. 13-1215, filed July 11, 2013); 47 C.F.R. §§ 64.604(b)(2)(iii)(A).

interest and is therefore denied. Specifically, we deny the requests for temporary waiver of the daily compliance measurement requirement and for modification of the Commission's approach to withholding of compensation for speed-of-answer violations.

## II. BACKGROUND

3. Since 1993, the Commission's rules have required that for most forms of telecommunications relay service (TRS), 85 percent of calls must be answered within 10 seconds.<sup>3</sup> Although the rule did not initially specify the interval for measuring speed-of-answer compliance, the rule was amended in 2000 to require that compliance with the standard be measured on a daily basis.<sup>4</sup> In 2005, the Commission adopted a different speed-of-answer requirement for VRS.<sup>5</sup> Recognizing concerns about a shortage of qualified interpreters and the need for providers to determine optimal staffing levels, the Commission applied a less strict standard to VRS and allowed compliance to be measured on a monthly rather than daily basis.<sup>6</sup> The Commission provided for a three-step, phased-in implementation of the initial VRS requirements, which culminated in requiring VRS providers to answer 80 percent of all VRS calls within 120 seconds by January 1, 2007.<sup>7</sup> The Commission stated its intention to revisit the speed-of-answer requirements when appropriate.<sup>8</sup>

4. In June 2013, finding that it had become feasible for VRS providers to meet a faster speed-of-answer standard, closer to that applicable to other forms of TRS, the Commission amended the speed-of-answer requirement to require that, by January 1, 2014, 85 percent of all VRS calls be answered within 60 seconds and that, by July 1, 2014, 85 percent of all VRS calls be answered within 30 seconds. Effective January 1, 2014, the Commission also changed the method for measuring speed-of-answer performance from monthly to daily, to be consistent with the compliance measurement method already used for other forms of TRS.<sup>9</sup>

5. Thus, whereas under the prior rule, VRS providers were required to answer 80 percent of all VRS calls within 120 seconds, with compliance measured on a *monthly* basis,<sup>10</sup> the strengthened rule,

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<sup>3</sup> 47 C.F.R. § 64.604(b)(2)(ii); *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Report and Order and Request for Comments, 6 FCC Rcd 4657, 4661, ¶ 21 (1991) (*1991 TRS Order*). The Commission explained that this standard would best meet the goal of providing relay services that are functionally equivalent to voice telephone services. *Id.* When initially adopted, this measurement applied only to relay calls between TTY users and voice telephone users. Over time, however this measurement came to be used for other forms of TRS, including IP Relay and all forms of captioned telephone relay services. 47 C.F.R. § 64.604(b)(2)(ii).

<sup>4</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5165, ¶ 60 (2000) (*2000 TRS Order*); 47 C.F.R. § 64.604(b)(2)(ii)(C).

<sup>5</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 03-123 and 98-67, Report and Order, 20 FCC Rcd 13165 (2005) (*2005 Speed-of-Answer Order*). VRS allows people with hearing or speech disabilities who use sign language to communicate with voice telephone users over a broadband Internet connection using video equipment. The video link allows the communications assistant (CA) to view the deaf or hard of hearing user's signed conversation and relay the conversation back and forth by signing what the voice telephone user says to the deaf or hard of hearing user and responding in voice to the voice telephone user. 47 C.F.R. § 64.601(a)(40); *2000 TRS Order*, 15 FCC Rcd at 5152-54, ¶¶ 21-27.

<sup>6</sup> *2005 Speed-of-Answer Order*, 20 FCC Rcd at 13174-76, ¶¶ 16-20.

<sup>7</sup> *Id.* at 13175, ¶ 19.

<sup>8</sup> *Id.* at 13176, ¶ 20.

<sup>9</sup> *2013 VRS Reform Order*, 28 FCC Rcd at 8671-73, ¶¶ 135-41, ¶ 135.

<sup>10</sup> 47 C.F.R. § 64.604(b)(2)(iii)(A)(I).

which became effective January 1, 2014, requires VRS providers to answer 85 percent of all VRS calls within 60 seconds, with compliance measured on a *daily* basis.<sup>11</sup> In addition, effective July 1, 2014, VRS providers must answer 85 percent of all VRS calls within 30 seconds, measured on a daily basis.<sup>12</sup>

6. In adopting the shorter maximum response times, the Commission found that providers were already largely achieving a 30-second speed-of-answer standard at current communications assistant (CA) staffing levels.<sup>13</sup> In adopting the daily compliance measurement requirement, the Commission noted this finding and observed, in addition, that the current VRS environment is unlike that present in 2005 when the original speed-of-answer standards were adopted. In 2005, VRS was a “nascent service,” and providers lacked experience in determining the CA staffing levels necessary to meet call demand and achieve compliance with the new standard. Since then, the Commission reasoned, VRS providers had accumulated nearly a decade of experience in providing VRS, which now enables them to assess staffing levels needed to meet a daily measurement window. Therefore, the Commission concluded, the original reason for deviating from the measurement window applied to other forms of TRS no longer applies.<sup>14</sup>

7. On October 24, 2013, ASL Services Holdings, LLC (ASL Services) filed a petition for waiver seeking a temporary, one-year waiver of the daily compliance measurement requirement.<sup>15</sup> ASL Services did not at that time seek any waiver of the underlying speed-of-answer standard setting forth the percentage of calls that must be answered within a specified number of seconds.

8. In its petition, ASL Services argues that the Commission’s justification for adopting the daily compliance measurement requirement does not apply to ASL Services, because, as a relatively new VRS provider, it lacks the decade of experience that the Commission attributed to providers in general.<sup>16</sup> In fact, ASL Services asserts, due to its lack of long term data and the unpredictability of its growth as a new provider, it is not yet able to calculate consistently predictable staffing levels on a daily basis. While affirming that, as of the date of its petition, it has consistently achieved 30 seconds or less answering time, ASL Services asserts that this was achieved based on a monthly speed-of-answer measurement, and that it is unclear whether the new speed-of-answer standard can be met on a daily basis.<sup>17</sup>

9. ASL Services maintains that it requires an additional year in which to obtain meaningful call data “on which predictable and sustainable staffing calculations can be based if measured daily.”<sup>18</sup> Rejection of the waiver request, ASL Services adds, will adversely affect consumers by increasing financial pressure on the company, hindering its ability to attract, employ, and properly train additional video interpreters, and creating the potential for slower speeds of answer and increased noncompliance.<sup>19</sup> ASL subsequently filed a supplement showing the speed-of-answer standards “and associated noncompliance penalties” of a number of European countries.<sup>20</sup>

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<sup>11</sup> *Id.*, § 64.604(b)(2)(iii)(A)(2).

<sup>12</sup> *Id.*, § 64.604(b)(2)(iii)(A)(3).

<sup>13</sup> *2013 VRS Reform Order*, 28 FCC Rcd at 8671, ¶ 137.

<sup>14</sup> *Id.* at 8672, ¶ 139.

<sup>15</sup> ASL Services, Petition for Waiver, CG Docket Nos. 03-123, 10-51 (filed Oct. 24, 2013) (ASL Services Petition). Inherent in ASL Services’ waiver request is a request that compensation not be withheld when the daily measurement indicates the standard is not met. *See 2013 VRS Reform Order*, 28 FCC Rcd at 8672, ¶ 139 n. 312.

<sup>16</sup> ASL Services Petition at 2.

<sup>17</sup> *Id.* at 5-6.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> *Id.* at 20.

<sup>20</sup> Letter from Andrew O. Isar, Miller Isar Inc., to Marlene H. Dortch, FCC Secretary CG Docket Nos. 03-123, 10-51, filed November 4, 2013 (ASL Services Supplement). ASL Services reports, for example, that in Sweden, the

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10. In a separate filing, three other VRS providers (Collective Providers) requested that the same temporary waiver sought by ASL Services be granted for all providers and, in addition, that the Commission modify its approach to withholding payment of Fund compensation when providers fail to comply with the speed-of-answer rule.<sup>21</sup> The Collective Providers urge that the percentage of compensation withheld from a provider be no greater than the difference between the percentage of calls answered within the applicable time limit and the percentage of calls required to be answered.<sup>22</sup>

11. Although the Collective Providers do not claim to be recent entrants, they assert that they are similarly situated to ASL Services with respect to “the potential for unprecedented call volume fluctuations, the need to overstaff to ensure daily compliance and providers’ limited experience under a fundamentally changed regulatory framework.”<sup>23</sup> Arguing that modifying the rule to require measurement of speed of answer on a daily basis was a “radical change inconsistent with current provider operations and consumer demand,” the Collective Providers assert that they had no opportunity to comment on the change.<sup>24</sup> Further, because the staffing of their VRS call centers is based on projections of typical customer usage, which do not address episodic, unexpected needs for additional staffing (*e.g.*, due to disasters or other unforeseeable events), the Collective Providers contend that they cannot forecast consumer demand on a daily basis.<sup>25</sup> As a result, they contend, it is likely that all providers occasionally will miss the speed-of-answer requirement and have compensation withheld.<sup>26</sup>

12. The Collective Providers also assert that the daily measurement requirement creates “perverse incentives for providers to reduce their service on a certain day when it becomes apparent that there is far greater consumer demand than reasonably projected for which compensation will be withheld that day.”<sup>27</sup> They add that the difficulty of meeting the new standard is exacerbated by the simultaneous reduction in VRS compensation rates ordered by the Commission.<sup>28</sup>

13. In addition to seeking a waiver, the Collective Providers urge the Commission to limit the withholding “penalty” for noncompliance to the loss of the provider’s compensation only for the percentage of calls in which it falls below the standard. The Collective Providers argue that this approach will maintain incentives for providers to continue to provide a high level of service and to seek additional staffing during surges in consumer demand, and thereby will help ensure that VRS remains available during unanticipated periods of high demand.<sup>29</sup> By way of example, under their proposed withholding scheme – assuming a standard requiring 85 percent of calls to be answered within a 30-second time frame

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speed-of-answer standard requires that, measured on a monthly basis, 70% of all calls must be answered in 30 seconds and 90% of all calls must be answered in 60 seconds. *Id.* at 2. *See also* Letter from Angela Roth, Managing Member, President, and Chief Executive Officer, ASL Services, to Marlene H. Dortch, FCC Secretary (April 24, 2014) (providing additional data in support of ASL Services’ waiver request).

<sup>21</sup> Letter from CSDVRS, LLC (CSDVRS), Sorenson Communications, Inc. (Sorenson), and Hancock, Jahn, Lee & Puckett, LLC d/b/a Communication Access Ability Group (CAAG) to Tom Wheeler, FCC Chairman, *et al.*, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Structure and Practices of Video Relay Service*, CG Docket Nos. 03-123, 10-51, at 1-3 (filed December 6, 2013) (Collective Providers Letter).

<sup>22</sup> *Id.* at 2-3.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1-2, 4.

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.* at 4-5.

<sup>29</sup> *Id.*

– if a provider only answers 70 percent of calls within 30 seconds, the provider would not be in compliance for 15 percent of its calls and therefore should lose no more than 15 percent of its compensation.<sup>30</sup>

14. The Consumer groups support these waiver requests,<sup>31</sup> as do Purple Communications, Inc. (Purple), and Convo Communications, LLC (Convo).<sup>32</sup> While generally supporting the daily measurement requirement, the Consumer Groups express concern that meeting the requirement may not be feasible in 2014 in some instances.<sup>33</sup> Additionally, they assert that meeting the daily measurement requirement will be hampered further by the compensation rate reductions imposed by the Commission in the *2013 VRS Reform Order*.<sup>34</sup> Thus, the Consumer Groups support a one-year waiver in order to allow the successful implementation of the daily measurement without causing a detrimental impact on VRS.<sup>35</sup>

15. On April 22, 2014, representatives of all six VRS providers met with CGB staff. In addition to reiterating their support for the waivers previously requested, the VRS providers, for the first time, urged the Commission to waive the 30-second speed-of-answer standard, which is scheduled to take effect July 1, 2014, as well as waiving the daily measurement requirement. The VRS providers contended that meeting the current 60 seconds/85 percent requirement requires extraordinary, unsustainable measures and that providers cannot meet the 30 seconds/85 percent requirement for reasons independent of cost. Specifically, the providers argued that the available supply of qualified VRS interpreters is too limited and that the exogenous factors affecting both call volume and interpreter availability on a day-to-day basis are too varied to enable compliance with that standard. In addition, the VRS providers contended that meeting the revised speed-of-answer requirement is hampered by the significant reductions in VRS compensation rates that will take effect over the next three years.<sup>36</sup>

16. On June 3, 2014, Sorenson submitted detailed information to support the claimed infeasibility of consistently meeting a daily speed-of-answer requirement and the extent to which Sorenson would have failed to satisfy a 30 seconds/85 percent requirement, had it been in effect during the first five months of 2014.<sup>37</sup> Sorenson's letter describes numerous factors that it contends place severe limits on the current supply of interpreters and on VRS providers' ability to maintain sufficient staffing at

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<sup>30</sup> *Id.*

<sup>31</sup> Letter from Telecommunications for the Deaf and Hard of Hearing, Inc., National Association of the Deaf, Association of Late-Deafened Adults, Inc., Cerebral Palsy and Deaf Organization, American Association of the Deaf-Blind, and California Coalition of Agencies Serving Deaf and Hard of Hearing, Inc. (Consumer Groups) to Tom Wheeler, FCC Chairman, CG Docket Nos. 03-123, 10-51 (filed December 30, 2013) (Consumer Groups Letter).

<sup>32</sup> Letter from Monica S. Desai, Patton Boggs LLP, to Marlene H. Dortch, FCC Secretary, CG Docket Nos. 03-123, 10-51 (Dec. 9, 2013) (Purple Letter); Letter from Jarrod Musano, Chief Executive Officer, Convo, to Marlene H. Dortch, FCC Secretary, CG Docket Nos. 03-123, 10-51 (Dec. 16, 2013) (Convo Letter); Letter from Angela Valcarcel-Roth, CEO/President, ASL Services, Everett Puckett, CEO, CAAG, Jeff Rosen, General Counsel, Convo, Sean Belanger, CEO, CSDVRS, John Goodman, Chief Legal Officer, Purple, and Michael Maddix, Director, Government and Regulatory Affairs, Sorenson, to Marlene H. Dortch, FCC Secretary, CG Docket Nos. 03-123, 10-51 (Apr. 24, 2013) (All Providers Letter).

<sup>33</sup> Consumer Groups Letter at 2.

<sup>34</sup> *Id.* at 2-3.

<sup>35</sup> *Id.* While Consumer Groups request that no payments be withheld for failure to meet the measured-daily requirement for a period of one year, they urge the Commission, during that period, to implement the 30-second, measured-daily requirement on a test basis while continuing to apply the pre-existing 120-second, measured-monthly requirement for compensation and enforcement purposes. *Id.* at 3.

<sup>36</sup> See All Providers Letter.

<sup>37</sup> Letter from John T. Nakahata *et al.*, Harris, Wiltshire & Grannis, LLP, CG Docket Nos. 03-123, 10-51, at 1 (June 3, 2014) (Sorenson Letter).

all hours to satisfy a daily speed-of-answer requirement, especially with a 30-second standard in effect.<sup>38</sup> The limiting factors reported by Sorenson include interpreter demographics, wage differentials between VRS and other interpreting opportunities, the high stress level of VRS interpreting, state regulatory requirements, the variability of interpreters' availability and willingness to work, and the unpredictability of daily and hourly demand for VRS.<sup>39</sup>

17. In addition, Sorenson notes that the supply of interpreters is limited by the current capacity of the educational system to train qualified interpreters. Sorenson estimates that although interpreter training programs offering a college or university degree produce about 750 new interpreters per year, only 375-400 of these graduates remain in the industry in the first year after graduation, and of these, a substantially smaller number may actually be eligible to interpret under a particular state's regulatory requirements.<sup>40</sup> Finally, Sorenson states that VRS interpreting requires additional skills and training, the development of which takes additional time and may result in further attrition, and that the number of interpreter applicants who pass Sorenson's proficiency screening is very low.<sup>41</sup>

### III. DISCUSSION

18. It is well established that the Commission has the authority to waive its rules if there is "good cause" to do so.<sup>42</sup> The Commission may do so where particular facts would make strict compliance inconsistent with the public interest.<sup>43</sup> The Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>44</sup> A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.<sup>45</sup> The Commission must take a "hard look" at applications for waiver<sup>46</sup> and must consider all relevant factors when determining if good cause exists.<sup>47</sup>

#### A. Requests for Temporary Waiver of the Daily Measurement Requirement

19. All providers have raised concerns with the Commission about their ability to satisfy the strengthened VRS speed-of-answer requirement. Nevertheless, in addressing requests for waiver of the speed-of-answer rule, especially a broadly applicable waiver such as that requested here, we must take account of the importance of the rule's underlying policy to ensure functional equivalence.<sup>48</sup> Notably, all

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<sup>38</sup> *Id.* at 2-4. See also *id.* at 4-7 (describing various kinds of unpredictable events, many of which occurred in January-May 2014 and, according to Sorenson, would have prevented it from complying with a 30 seconds/85 percent requirement, measured daily, had it been in effect).

<sup>39</sup> *Id.* at 3-4.

<sup>40</sup> *Id.* at 2-6.

<sup>41</sup> *Id.* at 4.

<sup>42</sup> 47 C.F.R. § 1.3.

<sup>43</sup> *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT Radio*), *aff'd*, 459 F.2d 1203, *cert. denied*, 93 S.Ct. 461 (1972). See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>44</sup> *WAIT Radio*, 418 F.2d at 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

<sup>45</sup> *Id.*, 897 F.2d at 1166.

<sup>46</sup> *WAIT Radio*, 418 F.2d at 1157; *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1224-25 (D.C. Cir. 1999).

<sup>47</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>48</sup> 1991 TRS Order, 6 FCC Rcd at 4661, ¶ 21. See also *Telecommunications Services for Hearing-Impaired and Speech Impaired Individuals, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Notice of Proposed Rulemaking, 13 FCC Rcd 14187, 14207, ¶ 49 (1998) (speed-of-answer requirement is "a cornerstone of the Commission's TRS rules"); 2000 TRS Order, 15 FCC Rcd at 5165, ¶ 60 (2000) ("For a TRS user, reaching a CA to place a relay call is the equivalent of picking up a phone and getting a dial tone."); 2005 Speed-of-Answer Order,

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other forms of TRS are required to meet a speed-of-answer standard based on daily measurement, reflecting a Commission judgment that daily compliance measurement is a key component of its speed-of-answer policy.<sup>49</sup> Indeed, in adopting the daily measurement requirement for non-VRS forms of TRS, in 2000, the Commission stated that “[t]he burden should be on relay services to manage staffing needs based on the fluctuations in traffic, not on consumers to tolerate delays in reaching a CA when traffic is high. Just like voice calls, TRS calls should be answered within a reasonable time period, regardless of the traffic load.”<sup>50</sup> Thus, it is not necessarily the case, as some providers argue, that waiver of the daily measurement requirement would have no impact on the public.<sup>51</sup> If providers are permitted to measure their compliance over a month, rather than on a daily basis, there would be a greater danger that consumers would experience wait times in excess of the specified time period, because providers would have less incentive to keep their speed-of-answer performance from falling below the standard on days when traffic exceeds projected levels.<sup>52</sup>

20. As noted in the *2013 VRS Reform Order*, the Commission did not previously apply a daily measurement requirement to VRS only because of transitory issues characterizing a “nascent service.”<sup>53</sup> In particular, the Commission wished to allow providers additional time “until they have determined, and are able to maintain, optimal VRS CA staffing levels to meet call demand.”<sup>54</sup> In the *2013 VRS Reform Order*, the Commission concluded that, more than a decade later, providers could be expected to have sufficient experience managing CA staffing levels to be able to comply with a daily requirement. Providers’ showings in support of their current requests for waiver do not persuade us that they have insufficient expertise in managing daily staffing levels to enable them to comply.<sup>55</sup>

21. We are also unpersuaded that the rate reductions adopted by the Commission are preventing providers from hiring a sufficient number of interpreters to enable them to comply with a daily requirement.<sup>56</sup> In this regard, the Commission put compensation rates for VRS providers on a “glide path” toward cost-based rates purposely to allow providers an opportunity to adapt gradually to the rate

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20 FCC Rcd at 13174, ¶ 17 (speed of answer is “one of the fundamental components of ensuring that TRS users have functionally equivalent access to the telephone system”).

<sup>49</sup> 47 C.F.R. § 64.604(b)(2)(ii).

<sup>50</sup> *2000 TRS Order*, 15 FCC Rcd at 5166, ¶ 63.

<sup>51</sup> *See, e.g.*, ASL Services Petition at 10.

<sup>52</sup> Thus, we are not persuaded by the providers’ speculative argument that the *daily* measurement requirement “creat[es] perverse incentives for providers to reduce their service on a certain day when it becomes apparent that there is far greater consumer demand than reasonably projected for which compensation will be withheld that day.” Collective Providers Letter at 2. This argument is inconsistent with the providers’ claims that when unpredictable events occur, they are unable to increase staff on short notice sufficiently to prevent violations. *See, e.g.*, Sorenson Letter at 6. Further, we conclude that *monthly* measurement causes more significant “perverse incentives,” *e.g.*, for providers to maintain staffing levels that are insufficient to ensure coverage during unexpected spikes in demand, or even to “reduce their service” on a high traffic day – even before it becomes “apparent” that they cannot meet the standard on that day – if they expect they can rely on monthly averaging to avoid any withholding of compensation.

<sup>53</sup> *2013 VRS Reform Order*, 28 FCC Rcd at 8672, ¶ 139.

<sup>54</sup> *2005 Speed-of-Answer Order*, 20 FCC Rcd at 13176, ¶ 19.

<sup>55</sup> *See* ASL Services Petition at 4-5; Collective Providers Letter at 2.

<sup>56</sup> *See id.* at 4-5. To the extent that the Collective Providers argue that the VRS rates adopted in the *2013 VRS Reform Order* are unsustainable (Collective Providers Letter at 5), that argument should have been made to the Commission in a petition for reconsideration of the *2013 VRS Reform Order*. Similarly, the Collective Providers’ argument that lack of notice prevented a fair opportunity for comment on the speed-of-answer standard adopted in the *2013 VRS Reform Order* (*id.* at 3-4) also should have been made to the Commission in a petition for reconsideration and is not suitable for consideration in this Order.

modifications and other changes mandated by the order.<sup>57</sup> Pursuant to this “glide path,” even Tier III rates, applicable only to the largest provider(s), will remain more than \$.85 per minute above average reported costs through June 30, 2015. The providers’ showings do not persuade us that, under the Commission’s graduated schedule of rate reductions, any provider currently lacks adequate leeway to maintain sufficient staff to comply with the current standard based on daily measurement.

22. ASL Services argues that it faces greater traffic management challenges, and thus higher costs, than other providers due to its shorter period of experience with VRS, its rapid growth, and its chosen specialty of offering Spanish language interpretation.<sup>58</sup> However, the Commission has maintained tiered rates for VRS compensation pending the completion of structural reforms, expressly to allow small providers who face higher per-minute costs a temporary opportunity to improve their efficiency and to grow to a size where they can take advantage of economies of scale.<sup>59</sup> Specifically, the Tier I compensation rates applicable to small providers will remain more than one dollar higher than the Tier III rates and almost two dollars higher than average provider-reported costs through June 30, 2015.<sup>60</sup> ASL Services has not shown that these rates will be insufficient to enable it to manage its staffing levels adequately in order to comply with a daily measurement requirement.

23. Although providers also argue that the supply of interpreters is too limited and variable to permit consistent compliance with a daily measurement requirement,<sup>61</sup> recent speed-of-answer compliance data confirm that, despite the unusual weather conditions of the past winter, and except for two days when one provider did not comply,<sup>62</sup> providers have been able as a matter of fact to maintain staffing levels and configurations sufficient to ensure full compliance with the current standard, which includes a daily measurement requirement, from January 1, 2014, through April 30, 2014.<sup>63</sup> Therefore, as applied to the current speed-of-answer standard requiring 85 percent of calls to be answered within 60 seconds, measured daily, there is affirmative evidence that the requested waiver is not necessary to maintain continuity of service to consumers. Further, as noted in section III.B below, the providers have not shown that the Commission’s existing waiver process is inadequate to address those instances where a provider, due to circumstances beyond its control, may have good cause for being excused from strict application of the speed-of-answer rule. Granting the requested blanket waiver under these circumstances, without a clear showing of need, would adversely affect the public interest by depriving consumers of assurance that their calls will be answered relatively promptly, *i.e.*, within 60 seconds, on any given day.<sup>64</sup> Therefore, we deny providers’ request for waiver of the daily measurement requirement.

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<sup>57</sup> 2013 VRS Reform Order, 28 FCC Rcd at 8703-07, ¶¶ 212-216.

<sup>58</sup> ASL Services Petition at 3-9.

<sup>59</sup> 2013 VRS Reform Order, 28 FCC Rcd at 8699-8702, ¶¶ 200-208.

<sup>60</sup> *See id.* at 8705-06, ¶ 215, Table 2.

<sup>61</sup> *See, e.g.*, Sorenson Letter at 1-7.

<sup>62</sup> *See* Letter from Aaron Wegehaupt, VP of Operations, CSDVRS, to Marlene H. Dortch, FCC Secretary, CG Docket No. 10-51 (filed March 26, 2014) (seeking a speed-of-answer waiver for two days in February 2014, citing extreme weather conditions).

<sup>63</sup> Information provided by Rolka Loube Saltzer Associates (RLSA), the TRS Fund administrator, based on providers’ speed-of-answer compliance data. The information submitted by Sorenson and others does not materially conflict with the data provided by RLSA. For example, Sorenson acknowledges that it is meeting the current 60-second, measured-daily requirement. Sorenson Letter at 2.

<sup>64</sup> *See* 2000 TRS Order, 15 FCC Rcd at 5166, ¶ 63. As noted above, if monthly measurement were allowed, that there would be a greater danger that consumers would experience wait times in excess of the specified time period, because providers would have less incentive to keep their speed-of-answer performance from falling below the standard on days when traffic exceeds projected levels.



24. Nonetheless, in light of the Commission’s determination to monitor provider compliance and “re-visit the speed-of-answer standard in the future if necessary,”<sup>65</sup> we invite providers to submit additional information to the Bureau, as they develop further experience with operating under the daily measurement requirement, regarding any challenges and costs of achieving compliance on a daily basis that might differ from the evidence that formed the basis for the Commission’s existing speed-of-answer rules, so that we can consider such information in developing recommendations for future policy development in this area.

#### **B. Request for a Sliding Scale Approach to Withholding Compensation**

25. We also deny providers’ request for reinstatement of a “sliding scale” approach to withholdings for violation of the speed-of-answer rule.<sup>66</sup> Under the Commission’s rules, a provider’s compliance with the speed-of-answer rule and other mandatory minimum standards set forth in section 64.604 is a condition precedent for disbursement of TRS Fund payments.<sup>67</sup> As the Bureau explained two years ago in *abandoning* a previously used sliding-scale approach to speed-of-answer withholdings, the Commission’s prior orders make clear that the numerical standard specified in the rule is a *minimum* standard defining the minimum acceptable level of speed-of-answer performance.<sup>68</sup> Service that falls below this standard is not functionally equivalent to voice service pursuant to the Act; such service is tantamount to service not having been provided at all, and does not merit any reimbursement from the TRS Fund.<sup>69</sup> The Bureau also found that “it is [not] prudent or necessary to apply a sliding scale in order to maintain a provider’s incentive to provide adequate service for the remainder of a day, after failing to meet speed-of-answer parameters early that day.”<sup>70</sup>

26. Providers’ request for us to reinstate a sliding scale approach is effectively a request to reconsider the prospective approach enunciated in the *Purple Withholding Order*.<sup>71</sup> Such action is not justified, even as a temporary waiver, on the basis of this record. Providers have not made a persuasive showing that the Commission’s decision to preclude any compensation in this context imposes such a hardship in the context of VRS speed-of-answer violations as to warrant the adoption of a sliding-scale approach to such violations. In those instances where there is a legitimate reason for a provider’s failure to comply with the rule, the option of requesting a waiver tailored to the particular situation remains

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<sup>65</sup> 2013 VRS Reform Order, 28 FCC Rcd at 8673, ¶ 141.

<sup>66</sup> As explained above, under the proposed sliding-scale approach, the percentage of compensation withheld for noncompliance would be limited to the percentage of calls in which the provider fell below the standard.

<sup>67</sup> See 47 C.F.R. § 64.604(c)(5)(iii)(E) (“The TRS Fund administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory minimum standards as required in § 64.604”). See also *id.* § 64.604(c)(5)(iii)(L).

<sup>68</sup> *Purple Communications, Inc., Request for Review of the Decision of the TRS Administrator to Withhold TRS Payments*, CG Docket No. 10-51, Order, 27 FCC Rcd 8014, 8024, ¶ 27 (CGB 2012) (*Purple Withholding Order*).

<sup>69</sup> *Id.* at 8024, ¶ 27. Thus, the withholding of compensation is not a “penalty” for noncompliance, as the providers have suggested. Rather, compensation is withheld because service provided on the day in question did not meet the minimum TRS standards and therefore does not qualify as service entitled to compensation from the TRS Fund.

<sup>70</sup> *Id.*

<sup>71</sup> The sliding-scale approach abandoned in the *Purple Withholding Order* was actually much stricter than the approach advocated by the providers here. Under the previously used sliding-scale approach discussed in the *Purple Withholding Order*, a provider whose percentage of calls answered within the applicable time limit on a particular day was 65 percent or lower would receive *no* compensation for that day. Under the approach currently advocated, a provider who answered only 65 percent of the calls within the time limit would lose only 20 percent of its compensation, *i.e.*, would still receive 80 percent of its compensation. Indeed, even a provider who answered *zero* percent of its calls within the time limit would lose only 85 percent of its compensation, *i.e.*, would still receive 15 percent of its compensation, even though it did not answer a single call within the specified time limit.

available to any provider.<sup>72</sup> The providers have not shown why this individualized waiver process should be short-circuited in favor of a major modification of the prospective approach to compensation specified in the *Purple Waiver Order*.

27. In reviewing any future requests for waiver of the speed-of-answer rule to excuse isolated instances of noncompliance, we will consider carefully the information submitted by providers as to the reasons for noncompliance. Although we will continue to apply rigorously the Commission's standards for justification of waivers as outlined above, we invite providers to include in any such requests specific details regarding the particular causes of spikes in demand and the particular factors such as severe weather conditions and competing demands for sign language interpreters that may be affecting the available supply of CAs for specific and limited periods of time.

### C. Request for Temporary Waiver of the 30-Second Standard

28. Although we deny the requests for temporary waiver of the daily measurement rule and for reinstatement of a sliding scale approach to compensation withholdings, we will grant a six-month waiver of the 30-second speed-of-answer standard. Under this waiver, for all providers, the 30-second speed-of-answer standard, which is currently scheduled to take effect July 1, 2014, will be waived through December 31, 2014. Particularly in light of the information presented regarding limitations on the rate of growth in the supply of interpreters,<sup>73</sup> we are persuaded that the imposition of a 30-second standard just six months after providers were required to adapt to a 60-second standard and a daily compliance requirement could be disruptive to the supply of qualified interpreters and to providers' ability to offer high quality service. Call data submitted by providers for the period from November 2013 through April 2014 indicate that, while most VRS providers' performance during that period does satisfy a 30 seconds / 85 percent standard on most days, VRS providers were failing to satisfy that standard about two days per month, on average.<sup>74</sup> Therefore, based on the information now available, it appears that the change to a 30-second standard that is to take effect July 1, 2014, may require some providers to increase staffing substantially<sup>75</sup> and, given the apparent relative inelasticity of the supply of interpreters, may have an adverse near-term impact on the quality of service to consumers if it takes effect when scheduled.<sup>76</sup>

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<sup>72</sup> For this reason, among others, we are not persuaded by the Collective Providers' argument that a sliding scale is preferable to full withholding of compensation for the day of a speed-of-answer violation "because, if an unforeseeable event leads a provider to conclude that it will fail to meet the standard, it would not be reasonable for the provider to take emergency steps to answer calls as fast as possible if it knows that it nevertheless may receive no compensation for the period, while it would be reasonable to take emergency steps to get as close to the 85% standard as possible if doing so will limit its penalty." Collective Providers Letter at 2. As a variant of the "perverse incentives" argument addressed above with respect to daily measurement, this argument has a similar weakness, in that the sliding scale approach arguably would undermine a provider's incentives to make sure the chance of a violation is as low as possible in the first place. Moreover, the availability of a waiver in appropriate cases should offset any "perverse incentives" the full withholding approach might otherwise create. If a provider were to slacken its efforts to comply on a day when it doubts it will meet the standard, such reduced efforts not only would increase the likelihood that the standard will not in fact be met, but also would undermine any justification the provider might otherwise be able to provide in support of a waiver.

<sup>73</sup> See, e.g., Sorenson Letter at 3-4 (describing the process for educating and training qualified VRS interpreters and providing an estimate of the number of available graduates and the attrition that occurs during and after that process).

<sup>74</sup> Analysis by RLSA based on providers' speed-of-answer compliance data. The confidential analysis provided by Sorenson regarding this issue, while not matching RLSA's analysis exactly, is roughly consistent with it. See *id.*, Exhibit 1 at 4-6.

<sup>75</sup> See, e.g., *id.*, Exhibit 1 at 12 (stating confidentially the number of additional interpreters that Sorenson believes it would have needed in a recent, unusually challenging month to operate in compliance with a 30-second standard).

<sup>76</sup> See, e.g., *id.* at 3-4; Letter from Shane H. Feldman, Executive Director, Registry of Interpreters for the Deaf, Inc., to Marlene H. Dortch, FCC Secretary (April 7, 2014) (noting research finding that "one of the top five stressors that

(continued...)

29. Deferring the effective date of the 30-second standard by six months provides an appropriate additional period of time for the supply of interpreters to grow and thereby to mitigate any short-term shortage of interpreters caused by increased staffing needs.<sup>77</sup> Although this temporary waiver of the 30-second standard will delay the improvement in functional equivalence that is expected to result, we find that such delay will serve the public interest, on balance, by ensuring that quality of service is maintained, avoiding undue disruption in the supply of interpreters, and allowing providers more predictability and stability in their operations during the transition to faster speed-of-answer requirements.

30. Therefore, we grant a six-month waiver of the effective date of the 30-second standard, in order to permit providers additional time in which to assess their staffing needs and to prepare to meet the further enhanced speed-of-answer requirements, including when there are unanticipated spikes in demand. During the six-month period of this waiver we expect VRS providers to prepare to meet the 30-second standard, measured on a daily basis, beginning January 1, 2015.<sup>78</sup> However, in light of the Commission's determination to monitor provider compliance and to "re-visit the speed-of-answer standard in the future if necessary,"<sup>79</sup> we invite providers to submit additional information to the Bureau regarding any challenges and costs of achieving compliance, so that we can consider such information in developing recommendations for future policy development in this area.<sup>80</sup> We also invite providers and others to submit information on the extent to which other factors, such as changes in providers' work rules, are affecting the supply of interpreters and whether improvements in working conditions and employment practices could alleviate some of the problems reported by providers in maintaining staffing levels.<sup>81</sup>

#### IV. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i) and 4(j) and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 225,

(Continued from previous page) \_\_\_\_\_

leads to burnout for video relay interpreters is the rate at which calls come in" and expressing concern that, if a faster standard is implemented without a sufficient transition period, "video interpreters will face increased risk of injury and burn out, thereby shrinking the pool of qualified video interpreters available to work in VRS").

<sup>77</sup> For example, this delay allows interpreters graduating from interpreting degree programs in June 2014 approximately six months to prepare for certification examinations and/or complete VRS training before entering the work force to assist providers in staffing up to ensure compliance with the 30-second standard. *See generally* Sorenson Letter at 3-4.

<sup>78</sup> We limit the period of this waiver to six months because we are not convinced that the current difficulties identified by the providers regarding recruitment of interpreters and achieving daily compliance with a 30-second standard are so severe and persistent as to warrant a longer waiver period. For example, Sorenson's analysis of its historical speed-of-answer record over an entire year shows that Sorenson's overall speed-of-answer performance for the last 12 months was substantially better than its recent 2014 performance, even though Sorenson arguably had less incentive to maximize its speed of answer in 2013, before the 60-second, measured-daily standard became effective. *Id.*, Exhibit 1 at 7.

<sup>79</sup> *2013 VRS Reform Order*, 28 FCC Rcd at 8673, ¶ 141.

<sup>80</sup> *See, e.g., id.* at 8718, ¶ 265 (seeking information on the costs and benefits of a further reduction in the wait-time portion of the standard and on whether compliance with a further modified standard should continue to be measured on a daily basis).

<sup>81</sup> *See, e.g.,* Comments of Communications Workers of America and National Interpreter Action Network, CG Docket No. 10-51, at 2-3 (filed Aug. 19, 2013) (stating that, in the past, providers have "respond[ed] to tighter benchmarks not by hiring more video interpreters, but instead by imposing unrealistic and harmful 'work speed-up'" requirements, causing video interpreters to reduce their VRS hours or leave the industry). *See also id.* at 4 (arguing that non-competition agreements in VRS employment contracts "artificially remove video interpreters from the available labor pool").

and sections 0.141, 0.361 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.141, 0.361 and 1.3, this Order IS ADOPTED.

32. IT IS FURTHER ORDERED that the requests of VRS providers for temporary waiver of the speed-of-answer rule ARE GRANTED to the extent and subject to the conditions set forth above and are otherwise DENIED, and that section 64.604(b)(2)(iii)(A)(3) of the Commission's Rules (47 C.F.R. § 64.604(b)(2)(iii)(A)(3)) IS WAIVED through December 31, 2014.

33. IT IS FURTHER ORDERED that the temporary waiver granted herein SHALL BE EFFECTIVE upon release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Acting Chief  
Consumer and Governmental Affairs Bureau